

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**SEP 14 2006**

**CATHY A. CATTERSON, CLERK**  
U.S. COURT OF APPEALS

DEBRA CARTER,

Plaintiff - Appellant,

v.

HEWLETT-PACKARD COMPANY and  
HEWLETT-PACKARD COMPANY  
INCOME PROTECTION PLAN,

Defendants - Appellees.

No. 05-16231

D.C. No. CV-04-03307-CW

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Northern District of California  
Claudia Wilken, District Judge, Presiding

Argued and Submitted August 16, 2006  
San Francisco, California

Before: CANBY, THOMPSON, and HAWKINS, Circuit Judges.

Debra Carter (“Carter”) appeals the district court’s judgment for the defendants.

Under the relevant disability-benefits plan (“the Plan”), an independent claims administrator, Voluntary Plan Administrator (“VPA”), determines whether a claimant

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<sup>\*</sup> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

qualifies for benefits. Carter seeks review of VPA's denial of her petition for long-term benefits, asserting that this denial was an abuse of the VPA's discretion.

*Abatie v. Alta Health & Life Insurance Co.*, No. 03-55601 (9th Cir. Aug. 15, 2006), filed the day before argument here, fundamentally changed how we review administrator determinations under the Employee Retirement Security Act, 29 U.S.C. §§ 1001–1461. *Abatie* states that abuse-of-discretion review is merited, in almost all cases, when the plan confers sufficient discretion to the plan administrator. No. 03-55601, slip op. at 9636-37. This court has held that the Plan sufficiently vests such discretion. *LaMantia v. Voluntary Plan Adm'rs, Inc.*, 401 F.3d 1114, 1123 (9th Cir. 2005). But *Abatie* also changed how courts are to apply the abuse-of-discretion standard, including (1) eliminating the need for plaintiffs to produce evidence of a serious conflict, *id.* at 9644; (2) allowing courts to “tailor the review” after weighing “all the facts and circumstances” that might indicate a conflict of interest, *id.* at 9646, 9648; and (3) allowing the court to weigh facts and circumstances outside of the administrative record, *id.* at 9650. Because *Abatie* creates such a significant shift in analysis and because of the district court's ability to conduct fact finding beyond the administrative record, the district court should apply *Abatie* in the first instance.

Remanded to the district court for proceedings consistent with this disposition.

**REMANDED.<sup>1</sup>**

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<sup>1</sup> This appeal was heard at the same time and before the same panel as *Wright v. Hewlett-Packard Co. Employee Benefits Organization Income Protection Plan*, No. 04-16754, and *LaMantia v. Hewlett-Packard Co. Employee Benefits Organization Income Protection Plan*, No. 05-16744. All three appeals have been remanded to district court for application of *Abatie*.